STATE OF NORTH CAROLINA

OFFICE OF ADMINISTRATIVE HEARINGS 6714 Mail Service Center Raleigh, NC 27699-6714 DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES 1601 Mail Service Center Raleigh, NC 27699-1601

July 19, 2012

Ms. Mary Wilkes, Regional Counsel Region 4 U.S. Environmental Protection Agency Office of Environmental Accountability 61 Forsyth St. SW Atlanta, GA 30303-9060 (404) 562-9655

Re: Procedures for NC Department of Environment and Natural Resources and NC Office of Administrative Hearings

Dear Ms. Wilkes:

We are submitting the following information as it may relate to the Memoranda of Agreement ("MOA") between the North Carolina Department of Environment and Natural Resources ("DENR") and USEPA regarding programs administered by DENR under the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act.

As you are aware, in 2011, the North Carolina Legislature passed Senate Bill 781 (Session Law 2011-398). That bill, enclosed for your convenience, changed the way in which contested cases challenging agency actions become final agency decisions. Some of these changes have been discussed in prior correspondence between your office, DENR, and the North Carolina Office of Administrative Hearings ("OAH"), copies of which are also enclosed. In Mr. Meiburg's letter to OAH dated January 19, 2012 he posed several threshold questions to OAH. These questions fall broadly into two categories:

¹ May 18, 2011 letter from DENR Secretary Dee Freeman to EPA; June 1, 2011 letter from Mr. A. Stanley Meiburg (EPA) to DENR Secretary Freeman; November 29, 2011 letter from Chief Judge Julian Mann, III (OAH) to Ms. Lisa P. Jackson (EPA); January 19, 2012 letter from Mr. Meiburg to Judge Mann. The May 18, 2011 and June 1, 2011 letters were discussing slightly different proposed legislation which was not ultimately enacted but which contained provisions included in Senate Bill 781 and that correspondence is therefore germane to the present discussion.

- 1. What is the scope of OAH's authority?
- 2. Will OAH take upon itself to modify permit or penalty terms, or will its review be restricted in scope?

Since receiving Mr. Meiburg's letter, OAH and DENR have reviewed these matters. Some context will be useful to the current discussion.

Procedure prior to Senate Bill 781:

The OAH is a quasi judicial agency created by statute, hearing a variety of administrative appeals from a broad spectrum of North Carolina agencies and commissions. The OAH consists of a Chief Administrative Law Judge, appointed by the Chief Justice of the North Carolina Supreme Court, a Senior Administrative Law Judge, and other Administrative Law Judges ("ALJ") appointed by the Chief Administrative Law Judge. In order to serve, the ALJs must be licensed to practice law, and must comply with the American Bar Association's code of conduct for ALJs. Although they are not required to have environmental, scientific, or other specialized expertise, they are required by law to give due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency

Previously, agency decisions under our federally delegated programs were first made by DENR. If the decision was appealed, the appeal would go to OAH. The ALJ would conduct hearings ² and compile an administrative record, which could include new evidence, including expert testimony. Once that evidence had been heard, the ALJ issued a decision. That decision, along with the full record, would go before the Environmental Management Commission ("EMC"). The EMC would then, under strict standards of review, review the entire record and render a decision defined in the APA as a final agency decision.

The EMC's final agency decision was appealable to North Carolina Superior Court (our trial court of general jurisdiction). The standard of review was split. Where the EMC had adopted the ALJ's decision, the Superior Court's review was a more deferential record test. Where the EMC had reversed or modified the ALJ's decision, the review was *de novo*.

The EMC is authorized to issue rules (N.C. Gen. Stat. § 143B-282) and issue declaratory rulings. N.C. Gen. Stat. § 143B-283 and N.C. Gen. Stat. § 150B-4. The EMC retains these powers under Senate Bill 781. The EMC, by Statute, is currently composed of thirteen members appointed by the Governor and six members appointed by the Legislative branch (three by the Speaker of the House and three by the President Pro Tempore of the Senate). Statutory limitations prohibit EMC members from making decisions in which they have an economic interest. The

² If the ALJ made an initial determination that OAH lacked jurisdiction, that decision was immediately appealable to Superior Court and was not subject to EMC review.

criteria for membership on the EMC are set by statute, assuring a broad spectrum of scientific backgrounds. N.C. Gen. Stat. § 143B-283.

Procedure under Senate Bill 781:

Senate Bill 781 changes the administrative appeal process. Initial decisions will still be made by DENR. If the decision is appealed to OAH, Senate Bill 781 has eliminated the EMC's review of ALJ decisions. Appeal is directly to Superior Court by any party (petitioner, DENR, or intervenor) based upon asserted error.

In addition, the judicial review standard has changed. The ALJ's decision will be accorded more deference. The whole record test will be applied to ALJ decisions in every case where the decision is alleged to be "[u]nsupported by substantial evidence admissible under G.S. §150B-29(a), §150B-30, or §150B-31 in view of the entire record as submitted or . . . [a]rbitrary, capricious, or an abuse of discretion." Senate Bill 781, Section 27. Previously, the court would have applied a *de novo* standard of review when the ALJ decision was not adopted by the agency.

Under Senate Bill 781, ALJ decisions on certain dispositive motions (judgment on the pleadings or summary judgment) are likewise immediately appealable by any party to Superior Court and no longer subject to EMC review.

On March 22, 2012, OAH sent DENR a letter, enclosed for your review. Based upon that letter and our discussions (including discussions with legislative staff), DENR and OAH agree that contested case hearings will be limited in scope to the issues previously enumerated by statute, *i.e.* determining whether DENR:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

N.C. Gen. Stat § 150B-23(a). OAH has not taken the position that Senate Bill 781 has broadened the scope of its review. Importantly, OAH has clarified that ALJs will not undertake the drafting of permit terms. If an ALJ finds that one of the five criteria has been met, the ALJ will not then undertake to correct DENR's error by redrafting permit terms. Instead, following an adverse finding by an ALJ, DENR (if it elects not to appeal the ALJ decision to Superior Court) would correct the error identified. To the extent provided in the MOA, EPA would have an opportunity in that process to comment upon DENR's issuance of any redrafted permit, as it would in any permitting process. EPA's right of review and objections would then apply to the redrafted permit as it would to the initial permit.

Senate Bill 781 calls for certain submissions by OAH to EPA, including seeking EPA approval to be an agency administering programs under the CWA, the CAA, and RCRA. OAH has not sought EPA's approval *per se*, but has instead articulated reasons why it believes that approval to be unnecessary since it will continue, as

before, to provide only a hearing function for aggrieved parties under N.C. Gen. Stat § 150B-23 and DENR will remain the permit issuing agency. See DENR's letter to Judge Mann, dated May 9, 2012, attached. In addition, that provision of Senate Bill 781 was recently amended by Senate Bill 810 (attached),³ which provides that OAH should seek EPA approval only "[i]f necessary to effectuate the purposes of this act..." Section 7.3.

Therefore, OAH and DENR agree that it will not be necessary to amend the existing MOAs or for OAH to formally seek agency responsibility designation from EPA. We hope this detailed review of the recent changes to North Carolina law will be helpful in reaching a resolution of any concerns EPA may have had regarding the existing MOAs and that you will agree with our conclusions regarding how to proceed. Of course, if you have any other questions, we would welcome the opportunity to discuss them and try to conclude this matter. Thank you for your attention to this and we look forward to hearing from you.

Very truly yours,

NC OFFICE OF ADMINISTRATIVE HEARINGS

Julian Mann, III

Chief Administrative Law Judge

NC DEPARTMENT OF ENVIRONMENT

& NATURAL RESOURCES

Dee Freeman

Secretary

³ Senate Bill 810 also extends to October 1, 2012 the previous deadline (June 15, 2012) contained in Senate Bill 781.